HENRY MCMASTER
ATTORNEY GENERAL

September 19, 2008

Bobby M. Bowers, Director
South Carolina Budget and Control Board
Office of Research & Statistics
1000 Assembly Street, Suite 425
Columbia, South Carolina 29201

Dear Mr. Bowers:

From your letter, we understand your office "certifies the population density, population, and distance from another incorporated area for the Secretary of States office for areas seeking incorporation." As such, you recently received a request for the area of Sun City in Beaufort County for a population determination for purposes of a potential incorporation pursuant to chapter 1 of title 5 of the South Carolina Code. In determining whether Sun City satisfies the qualifications for incorporation, you inquire as to whether the population determination required under section 5-1-30(B)(1) of the South Carolina Code requires population to be that as determined by the latest official United States Census or whether it can be based upon "the assumption of growth in the absence of the census in Section (B)(1)?"

Law/Analysis

As you explained in your letter, chapter 1 of title 5 of the South Carolina Code (Supp. 2007) governs municipal incorporations. Section 5-1-30 of the South Carolina Code establishes the prerequisites for receiving a corporate certificate. This section calls for the Secretary of State to determine "based on the filing submitted and the recommendation of the Joint Legislative Committee on Municipal Incorporation whether the proposed municipality meets the . . . requirements." S.C. Code Ann. § 5-1-30(A). These requirements include, in pertinent part:

> (1) the area seeking to be incorporated has a population density of at least three hundred persons a square mile according to the latest official United States Census, except as provided in subsections (B) through (E);
>
> (2) no part of the area is within five miles of the boundary of an active incorporated municipality, except as provided in subsections (B) through (E);

. . .

Id.

You informed us that Sun City meets the first requirement in that its population density is at least three hundred persons a square mile according to the latest official United States Census. However, we understand that Sun City does not meet the second qualification as the proposed area for incorporation is within five miles of the boundary of an active incorporated municipality. Accordingly, Sun City must satisfy one of the exceptions contained within subsections (B) through (E) of section 5-1-30.

You state Sun City is looking particularly at the exception contained in subsection (B)(1) of section 5-1-30. This provision provides as follows:

> When an area seeking incorporation has petitioned pursuant to Chapter 17 the nearest incorporated municipality to be annexed to the municipality, and has been refused annexation by the municipality for six months, or when the population of the area seeking incorporation exceeds seven thousand persons, then the provision of the five-mile limitation of this section does not apply to the area.

S.C. Code Ann. § 5-1-30(B)(1).

You indicate that Sun City is interested in the exception pertaining to areas exceeding 7,000 persons and provided the following information in that regard:

> Our analysis according to the 2000 Census shows Sun City to have a population of only 2,867 persons in 2000 with a population density of 413 per square mile in the area proposed for incorporation. However the analysis of the registered voters in the area of September 4, 2008 lists 8,714 persons registered to vote in the seven (7) voting precincts. Also as analysis of the current 911 addresses file with verification from the county ortho-photography shows approximate 7,789 residential addresses. Both show substantial growth in the area. With this kind of growth, one could assume that the population is now substantially over 7,000 persons.

Accordingly, you ask us whether "given the ambiguity of the statute, are we required to use the 2000 decennial census or should we use the assumption of the growth in the absence of the census in Section (B)(1)?"

In order to answer your question, we must look to the rules of statutory interpretation.

> The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. All rules of statutory construction are subservient to the maxim that legislative intent must prevail if it can be reasonably discovered in the language used. A statute's language must be construed in light of the intended purpose of the statute. Whenever possible, legislative intent should be found in the plain language of the statute itself. Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning.

State v. Pittman, 373 S.C. 527, 561, 647 S.E.2d 144, 161 (2007)(citations and quotations omitted). "When construing statutory language, the statute must be read as a whole, and sections which are part of the same general statutory law must be construed together and each one given effect." Foothills Brewing Concern, Inc. v. City of Greenville, 377 S.C. 355, 363, 660 S.E.2d 264, 268 (2008). According to our Supreme Court in Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (2000) (quoting Black's Law Dictionary 602 (7th ed. 1999)), "[t]he canon of construction 'expressio unius est exclusio alterius' or 'inclusio unius est exclusio alterius' holds that 'to express or include one thing implies the exclusion of another, or of the alternative.'" Moreover, "the court cannot add to [statutes] other words which would give them a different meaning without making, instead of construing, the statute." Independence Ins. Co. v. Indep. Life & Acc. Ins. Co., 218 S.C. 22, 34, 61 S.E.2d 399, 405 (1950).

In reading section 5-1-30 as a whole, we note the Legislature's inclusion of the requirement that population density must be determined based upon the "latest official United States Census" in subsection (A)(1). Furthermore, the exception found in subsection (E) of section 5-1-30, stating the "five-mile limit does not apply to counties with a population according to the latest official United States Census of less than fifty-one thousand," also requires use of the latest official United States Census to ascertain population. However, the exception found in subsection (B)(1) does not specifically state that population must be based upon the latest official United States Census. By the fact that the Legislature did not specify that population shall be determined by the latest official United States Census when determining whether the area to be incorporated contains at least seven thousand persons, indicates its intention not to restrict the method of determining population for purposes of this exception. If the Legislature intended for the population of the area to be determined solely by the latest official United States Census, we believe it would have specified this requirement as it did in subsections (A)(1) and (E) of section 5-1-30. Moreover, we believe that to interpret the reference to population contained in subsection (B)(1) as requiring it to be determined based on the latest official United States Census effectively adds a requirement to this provision that the Legislature chose not to add. Accordingly, we do not believe the determination of Sun City's population is restricted to the latest official United States Census in ascertaining whether the population exceeds seven thousand persons for purposes of section 5-1-30(B)(1).

Although South Carolina courts have not addressed this issue, we note that our conclusion coincides with the findings of courts in other jurisdictions. In Williams v. Castleman, 247 S.W. 263 (Tex. 1922), the Texas Supreme Court considered whether the population requirement in a provision of the Texas Constitution calling for the election of justices of the peace must be based on the federal decennial census. The constitutional provision did not specifically require that the decennial census be used. Id. Therefore, the Court found:

> If the commissioners' court is restricted to population, as determined by the United States census reports, available but once in 10 years, then the express provision that the county is to be divided into precincts for the convenience of the people (a power which we have seen is potential and may be acted upon at all times) is defeated by the suggested limitation of the census reports. The census reports could, therefore, have no application to the division of the county into precincts; and, if it is not to be applied and used for that purpose, then by what course of reasoning could we say that it must be applied, and it alone must be used, in determining the population of any particular integral part of the precinct? Reading the entire section together, and bearing in mind its history and its primary and fundamental purpose as shown by that history, we believe that the entire subject is confided to the commissioners' court, and that the court of any particular county is empowered to divide it into precincts, and to designate or afterwards determine which of these precincts contains cities of 8,000 or more inhabitants.

Id. at 267-68.

The Alabama Supreme Court came to a similar conclusion in Ryan v. Mayor, etc., of City of Tuscaloosa, 46 So. 638 (Ala. 1908). In that decision, the Court determined whether the population requirement set forth in a constitutional provision for purposes of setting a limitation on municipal-bonded indebtedness must be established by applying the latest federal decennial census. Id. The constitutional provision generally provided that municipalities with populations less than 6,000, with few exceptions, cannot become indebted for an amount exceeding five percent of the assessed value of the property located in the municipality. Id. at 641. The Court noted that this provision is silent as to the method by which population is determination. Id. However, the Court considered the argument that population should be determined by the last federal census. Finding in opposite of this argument, the Court held:

> If so it was ruled, the result would be, not only an unwarranted interpolation of a most material provision into the section, but also to render the section utterly unavailable, possibly for near ten years between decennial federal censuses, to towns and cities having, at the time such census was taken, less than 6,000 population,

> notwithstanding within a month thereafter the population was greater than 6,000. In short, under the construction urged for complainant, it is easily conceivable that for nine years and more the privilege of the section would be denied to towns and cities having in fact the requisite population at the time the bonds were desired to be issued; but to such a result the makers of the Constitution have, under no interpretation, written.

Id. In further support of the Court's conclusions it added that other provisions of the Constitution specify that the decennial federal census shall be used to ascertain population. Id. Accordingly, the Court concluded: "From this it is evident that, in omitting mention of such census in the section under consideration, a clear intent is manifested to leave the ascertainment, upon occasion, of the population to means properly serviceable to that end." Id.

Again in Toth v. Board of Liquor Control, 84 N.E.2d 256 (Ohio Com. Pl. 1948), an Ohio court made the same determinations as the Texas and Alabama Courts cited above. In this opinion, the Court considered the establishment of population for purposes of obtaining liquor permits. Id. The statute limited the issuance of the permit sought to one per ever two thousand in population, but did not designate a method of determining population. Id. at 257. Thus, one party argued that population should be determined based on the federal census. Id. The Court rejected this argument finding as follows:

> [I]n the absence of any statutory declaration to that effect, no existing census can be held conclusive when the fact is challenged, as in this case. We find from the record in this case that the applicant introduced evidence which shows conclusively that the population of the City of Akron for the year 1947 to be substantially in excess of 280,000, but that said Board of Liquor Control did not offer any evidence to controvert that fact, having relied upon the federal census of 1940. The federal census is taken once every ten years. Hence a very good reason existed why the Legislature did not make the federal census the test of population. If it had, in many rapidly growing communities, applicants might have to wait nearly ten years before they would be eligible for such permits. It was no doubt deemed quite safe to depend upon the actual fact as to what the population was, since it is not very difficult to determine the population of any county, city or village by relevant and competent evidence, as was adduced in this case relative to the City of Akron. A special enumeration could, of course, have been provided for; but it was not, and it is idle to speculate why. In conclusion, the Court holds that where the Legislature fails to provide, as in Sec. 6064-17, General Code, a specific census or other method of enumeration, population may be proved by relevant and competent evidence as any other fact,

> and that the record in this case shows conclusively that the quota for Akron was not filled.

Id.

According to our analysis above, we are of the opinion that population for purposes of implementing section 5-1-30(B)(1) does not require application of the latest official United States Census. However, we do not discount this method of calculating population as it provides a very strong basis upon which population calculations may be determined. Thus, even if not specified pursuant to the relevant statute as the method of determining population, we believe it is often prudent to consider the federal census in making population determinations. Furthermore, in your request to us, you provided indications of Sun City's current population based on such figures as voter registration and 911 addresses. While these methods are surely relevant to the determination of an area's population, in this opinion, we do not attempt to conclusively determine the efficacy of employing these figures for population determination. Rather, we simply state our opinion that the determination of population as cited in section 5-1-30(B)(1) is not restricted to that established by the latest official United States Census.

Conclusion

According to our analysis above, we are of the opinion the population, as referenced in section 5-1-30(B)(1), is not required to be based upon the latest official United States Census. Therefore, if Sun City seeks to use the exception to the five-mile limitation located in the later portion of this provision, we do not believe it is restricted to the population as determined by the 2000 decennial census.

Very truly yours,

Henry McMaster
Attorney General

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By: Cydney M. Milling
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REVIEWED AND APPROVED BY:

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